

HONORABLE JAMES L. ROBART

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

OLD REPUBLIC TITLE, LTD.,

Plaintiff,

v.

TROY X. KELLEY and DIANE  
DUFFRIN KELLEY, individually and as  
a marital community; BLACKSTONE  
INTERNATIONAL, a Nevada  
corporation; and BERKELEY UNITED,  
LLC, a Nevada Corporation,

Defendants.

No. 10-cv-00038-JLR

**MOTION RE: JURY TRIAL**

NOTE ON MOTION CALENDAR:  
April 29, 2011

**Introduction and Relief Requested:** Because a timely jury demand was not made and leave of court was not requested to extend the deadline, Plaintiff Old Republic requests a ruling whether this case will be tried before the court or a jury. Because of the significant additional expense involved in a jury trial and in light of the pending summary judgment motions, Old Republic no longer requests a jury. Defendants decline to consent to withdraw the jury demand.

**Facts:** When the present lawsuit was filed in King County Superior Court on December 10, 2009, Old Republic did not request a jury trial. Defendants Kelley removed the lawsuit to federal court on January 6, 2010. (Dkt. 1) Following removal, on January 7, 2010, the Court Clerk, Bruce Rifkin, sent a letter

MOTION RE: JURY DEMAND (No. 10-cv-00038-JLR) - 1

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1 to counsel stating, in part, "Your attention is directed to the provisions of Rule  
2 38(b) and 81(c) of the Federal Rules of Civil Procedure, pertaining to the filing of  
3 demands for trial by jury in Federal Court." (Dkt. 2) Kelley filed his Answer on  
4 January 8, 2010, without requesting a jury. (Dkt. 3) On March 2, 2010, Old  
5 Republic filed a separate Jury Demand. (Dkt. 5)

6 **Authority:** Civil Rule 38(b) and (d) provide:

7 (b) Demand.

8 On any issue triable of right by a jury, a party may demand a jury  
9 trial by:

10 (1) serving the other parties with a written demand — which  
11 may be included in a pleading — no later than 14 days after the  
12 last pleading directed to the issue is served; and

13 (2) filing the demand in accordance with Rule 5(d).

14 \* \* \*

15 (d) Waiver; Withdrawal.

16 A party waives a jury trial unless its demand is properly served and  
17 filed. A proper demand may be withdrawn only if the parties  
18 consent.

19 In the Western District of Washington, Local Rule 38(b) provides that to  
20 request a jury, "the words 'JURY DEMAND' shall be typed in capital letters on the  
21 first page immediately below the name of the pleading to the right o the name of  
22 the cause." This was not done by either party.

23 Rule 81(c)(3) does not change the deadlines above because neither the  
24 defendants' Answer nor any jury demand were filed in state court before the  
25 lawsuit was removed. Lutz v. Glendale Union High School, 403 F.3d 1061, 1063  
26 (9<sup>th</sup> Cir. 2005); see also 9 Wright & Miller, Federal Practice and Procedure, § 2318  
(Rule 81(c)(3)(B) "applies only if all the necessary pleadings have been served in  
the state court proceeding prior to removal. If they have not, the usual provisions

1 of the Federal Rules, particularly Rule 38(b) and Rule 81(c)(3)(A) govern the time  
2 in which to demand a jury.").

3 The trial court has limited discretion to allow an untimely jury demand:

4 Although the right to a jury trial is a constitutional one, the  
5 Federal Rules of Civil Procedure, which set out time limits for  
6 invoking this right, are authoritative. A court's exercise of discretion  
7 in denying a motion for a jury trial, based on these rules, does not  
8 impinge upon a party's constitutional rights. See Pacific Queen  
9 Fisheries v. Symes, 307 F.2d 700, 718-719 (9th Cir. 1962), cert.  
10 denied, 372 U.S. 907, 83 S.Ct. 721, 9 L.Ed.2d 717 (1963).  
11 Moreover an "untimely requests for a jury trial must be denied  
12 unless some cause beyond mere inadvertence is shown."  
13 Mardesich v. Marciel, 538 F.2d 848, 849 (9th Cir. 1976) (per  
14 curiam); Galella v. Onassis, 487 F.2d 986, 989 (2d Cir. 1973).

15 Chandler Supply Co. v. GAF Corp., 650 F. 2d 983, 987 (9<sup>th</sup> Cir. 1980).

16 **Conclusion:** Old Republic filed an untimely jury demand without leave of  
17 court. The foregoing motion is submitted to determine whether the case will be  
18 tried to the court or a jury. Given the issues in the case, the pending summary  
19 judgment motions, and to avoid the additional time and expense involved in a jury  
20 trial, Old Republic no longer requests a jury trial.

21 DATED this 14<sup>th</sup> day of April, 2011.

22 /s/Scott A. Smith  
23 Scott A. Smith, WSBA #11975  
24 William P. Brewer, WSBA #37055  
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Attorneys for Plaintiff  
Old Republic Title, Ltd.

**CERTIFICATE OF SERVICE**

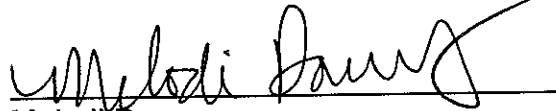
I, Melodi Downs, states as follows:

I am over 18 years of age and a citizen of the United States. I am employed as an executive assistant by the law firm of Riddell Williams P.S.

On the date noted below I electronically filed the foregoing pleading using the CM/ECF system and caused to be delivered true and accurate copies of the same via the CM/ECF system which will send notification of such filing to:

Judy A. Endejan, WSBA #11016  
David C. Lundsgaard, WSBA #25448  
GRAHAM & DUNN PC  
Pier 70 – 2801 Alaskan Way, Ste. 300  
Seattle, WA 98121-1128  
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this Certificate of Service was executed on this 14<sup>th</sup> day of April, 2011, at Seattle, Washington.

  
Melodi Downs